Filed 8/9/04 P. v. Fakhry CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FARHAD RONALD FAKHRY, Defendant and Appellant.	E033273 (Super.Ct.No. FSB35392) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Raymond L. Haight, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Appellate Defenders, Inc. and Beatrice C. Tillman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Holley Hoffman and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant was charged with burglary (count 1; Pen. Code, § 459), unlawfully taking or driving a vehicle without the owner's consent and with the intent to deprive the owner of title or possession (count 2; Veh. Code, § 10851, subd. (a)),[1] and receiving stolen property (count 3; Pen. Code, § 496, subd. (a)). A jury found defendant not guilty as to count 1 and guilty as to counts 2 and 3. The court sentenced defendant to three years for count 2. He was sentenced to two years for count 3, to run concurrently with the sentence on count 2.

Defendant contends: (1) the court erred in failing to sua sponte give CALJIC No. 17.01 as to count 3; (2) the evidence was insufficient to convict defendant under count 2; and (3) the defendant was improperly convicted of violating section 10851 (under count 2) and receiving stolen property (under count 3). We reject these contentions and affirm.[2]

---

[1] All further statutory references are to the Vehicle Code unless otherwise indicated.

[2] The information was filed in San Bernardino County Superior Court case number FSB34530. In a separate matter, San Bernardino County Superior Court case number FSB35392, defendant pled guilty to a count of burglary. (Pen. Code, § 459.) In that case, defendant was sentenced to three years, to be served concurrently with the sentence imposed in case number FSB34530. Defendant filed an amended notice of appeal, which states he is appealing from the judgment in case number FSB34530 and from the sentence imposed in case number FSB35392. In his appellate brief, defendant sets forth facts regarding case number FSB35392 and states that he is appealing "the sentence or matters occurring after the plea" in that case. He does not, however, present any argument in support of an appeal of the sentence or any other matter in that case. We

[footnote continued on next page]

STATEMENT OF FACTS

At approximately 1:45 in the afternoon on April 29, 2002, Krista Menge noticed that her car was missing from the garage of her home in Corona. Neither she nor her husband had given anyone permission to use the car. Her car keys, sunglasses, camera, and a metal box were missing from inside the home. The box contained receipts, social security cards, state commemorative coins, Sacagawea gold coins, Susan B. Anthony dollar coins, and $2 bills. The serial numbers of many of the $2 bills were in sequential order and held together with a pink paper clip. One pair of state commemorative quarters were kept in a protective plastic case.

About 3:20 that afternoon, a police officer located Menge's car parked in the parking lot of an apartment complex in San Bernardino. There is no evidence in the record that the car's engine was running when the officer arrived or of how long it had been parked. Another officer arrived and the two officers drove toward the car. As they approached, both front doors of the Menge's car opened. Mario Galindo fled from the driver's side of the car and defendant fled from the passenger side. One officer caught Galindo, who had in his pockets a pair of state commemorative quarters in a protective plastic case, a gold Sacagawea coin, two Susan B. Anthony dollar coins, several state commemorative coins, and a series of $2 bills with sequential serial numbers held with a pink paper clip. A second officer caught defendant, who had some state commemorative

---

[footnote continued from previous page]
therefore deem the appeal of case number FSB35392 abandoned. (See *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 9, fn. 1.)

coins, a Sacagawea gold dollar coin, and a Susan B. Anthony dollar coin in his pockets. In the car, police found the Menge's camera, sunglasses, and the Menge's metal box. Also found in the car was another metal box and a coat, neither of which belonged to the Menges. The keys were in the car's ignition.

Defendant and Galindo were tried together. Neither testified nor called any witnesses in their defense. The court did not give CALJIC No. 17.01 or similar instruction regarding the necessity of unanimity.

ANALYSIS

A. *Juror Unanimity*

Defendant contends the court was required to give sua sponte CALJIC No. 17.01, which instructs the jury on the requirement of juror unanimity.[3] He contends some of the jurors might have believed he was guilty of receiving the stolen car, while others might have found him guilty based upon his possession of the coins and other stolen items found in his pockets. We disagree.

---

[3] CALJIC No. 17.01 provides: "The defendant is accused of having committed the crime of ____ [in Count ___]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count _____] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ____], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

"When a defendant is charged with a single criminal act but the evidence reveals more than one such act, the prosecution must either select the particular act upon which it relies to prove the charge or the jury must be instructed that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act." (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499.) When such an instruction is proper, the court must give it sua sponte. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

A unanimity instruction is not required when the various criminal acts are part of a continuous course of conduct. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281.) This exception applies in "two circumstances—when the two offenses are so closely connected in time that they form part of one transaction or when the offense consists of a continuous course of conduct." (*People v. Winkle* (1988) 206 Cal.App.3d 822, 826.) Here, even if the evidence was sufficient to support conviction based upon the receipt of the stolen car, such receipt occurred close in time, if not concurrently, with the receipt of the stolen coins. If defendant received all such stolen property, he received it as part of one transaction.

Moreover, even if there was sufficient evidence to support guilt based upon receipt of the stolen car, a unanimity instruction need not be given if there was no evidence from which the jury could have concluded that defendant was guilty of receiving the stolen car but not guilty of receiving the stolen coins. (See *People v. Riel, supra,* 22 Cal.4th at p. 1199.) Here, there was no such evidence. If the defendant did "receive" the stolen car, there is no evidence from which the jury could have concluded that he received the car

without also receiving the coins in his pocket. There was thus no danger that some jurors would have found he received the car but did not receive the coins, while others found that he received the stolen coins but not the car. (See *ibid.*)

B. *Substantial Evidence of Vehicle Theft*

Defendant contends the evidence was insufficient to support the conviction for violating section 10851.[4] We disagree.

In reviewing a challenge to the sufficiency of the evidence, we must examine the entire record in the light most favorable to the judgment and determine whether it discloses substantial evidence -- evidence that is reasonable, credible, and of solid value -- to support the jury's finding. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We presume the existence of every reasonable fact and inference necessary to support the finding. (*Ibid.*) Even if the circumstances reasonably support a contrary finding, reversal is not required so long as substantial evidence supports the jury's finding. (*Ibid.*)

"'The elements necessary to establish a violation of section 10851 . . . are the defendant's driving or taking of a vehicle belonging to another person, without the

---

[4] Section 10851, subdivision (a), provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or in the state prison or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment."

owner's consent, and with specific intent to permanently or temporarily deprive the owner of title or possession.'" (*People v. Green* (1995) 34 Cal.App.4th 165, 180, quoting *People v. Windham* (1987) 194 Cal.App.3d 1580, 1590.) "Taking" a vehicle, within the meaning of section 10851, means "the act of removing the vehicle from the owner's possession." (*People v. Frye* (1994) 28 Cal.App.4th 1080, 1088.) "Driving" a vehicle in violation of section 10851 occurs "simply by the act of *driving* a car without the owner's consent; the defendant need not have committed the original act of taking the car from the owner." (*People v. Frye, supra,* at p. 1086.)

Defendant contends there is no evidence to support a conviction based upon the *driving* of the Menge's car. We agree. One cannot be guilty of violating section 10851 merely by being a passenger in a stolen car. (*People v. Lewis* (1947) 81 Cal.App.2d 119, 125; *People v. Champion* (1968) 265 Cal.App.2d 29, 32.) Defendant was found sitting in the passenger seat of the parked car while Galindo was in the driver's seat. There is no direct or circumstantial evidence from which a reasonable jury could find defendant guilty of driving the Menge's car.

There is, however, sufficient evidence to find defendant guilty of *taking* the Menge's car. *Taking* and *driving* a car without the permission of its owner are separate and distinct acts, each of which violates section 10851. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 759, fn. 6.) One can "take" the car from the possession of its owner within the meaning of section 10851, without driving it, by acting in concert with another who

physically removes the car. (See *People v. Donnell* (1975) 52 Cal.App.3d 762, 768-769; *People v. Quisenberry* (1957) 151 Cal.App.2d 157, 159.)

Here, defendant and Galindo were found in the stolen car approximately one and one-half hours after it was stolen, each with a portion of the money taken from the Menge house in their pockets. Upon seeing the police, they fled. The jury could reasonably infer from such facts that the two had acted together in taking the car from the Menge's possession and were dividing up the property they had stolen. (See *People v. Ragone* (1948) 84 Cal.App.2d 476, 478-480.)

Defendant contends the jury's acquittal on the burglary count means the jury must have determined that he did not enter the Menge house; therefore, he argues, he could not have taken the car keys. Even if the acquittal of the burglary count and the conviction under section 10851 were inconsistent, it is well settled that a jury may properly return inconsistent verdicts on separate counts. (See *People v. Amick* (1942) 20 Cal.2d 247, 251-252; *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1656-1657; see also Pen. Code, § 954.) Moreover, when, as here, the challenge is to the sufficiency of the evidence, "there is no prohibition against considering all of the evidence in the record to determine the sufficiency of evidence on one count merely because the jury did not reach a unanimous verdict on a count to which the evidence may have related." (*People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1735, fn. 6.)

C. *Convictions on Both Counts 1 and 2*

Defendant contends that if, as we concluded above, the conviction under count 2 must be based upon the taking (and not the driving) of the car, then the conviction for receipt of stolen property cannot stand. We disagree.

Defendant relies upon the rule that a defendant may not be convicted for both stealing and receiving the same property. (See *People v. Jaramillo, supra,* 16 Cal.3d at p. 757.) As set forth in the discussion above regarding juror unanimity, it is clear from the record that the conviction for receipt of stolen property was based upon, at least, the receipt of the stolen coins found in defendant's possession. That is, the jury could have based its verdict on receipt of stolen property upon either (1) receipt of the stolen coins, or (2) receipt of both the stolen coins and the stolen car; there was no evidence, however, upon which the jury could reasonably have concluded that defendant received *only* the stolen car and not the coins. Because the conviction for receipt of stolen property was based upon, at a minimum, receipt of the stolen coins, and the conviction for violating section 10851 was based upon the taking of the car, the conviction does not violate the rule against convictions for both receipt and theft of the *same property.* Accordingly, defendant was properly convicted of both counts.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Ward
J.